No. 17-1272

In the Supreme Court of the United States

HENRY SCHEIN, INC., ET AL., PETITIONERS

v.

ARCHER AND WHITE SALES, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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In opposing certiorari, respondent presents a warmed-over version of the same arguments it made in unsuccessfully opposing petitioners' application for a stay. Try as it might, respondent cannot deny the existence of a clear and expressly recognized conflict on the question presented. And while respondent halfheartedly argues that this case is a poor vehicle in which to consider that question, respondent fails to identify any valid obstacle to the Court's review. The conflict on the question presented demands the Court's immediate attention.

The remainder of respondent's brief reads more like a dress rehearsal for its arguments on the merits than a traditional opposition to certiorari. Respondent is of course

free to advance those arguments if the Court grants review. For now, it suffices to note that respondent's analysis of the merits simply underscores the need for this Court to reaffirm the "liberal federal policy favoring arbitration agreements," *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, 460 U.S. 1, 24 (1983), and to ensure that parties such as petitioners retain their bargained-for contractual rights. This case is an obvious candidate for further review, and the petition for a writ of certiorari should be granted.

1. Respondent strains credulity when it denies that a circuit conflict exists on the question whether the Federal Arbitration Act permits a court to decline to enforce an agreement delegating questions of arbitrability to an arbitrator if the court concludes the claim of arbitrability is "wholly groundless." See Br. in Opp. 14-20.

a. Respondent first protests that the Tenth and Eleventh Circuits did not actually do what they said they were doing when they categorically rejected the "wholly groundless" exception as a matter of law. See Br. in Opp. 14-16. But those courts could not have been clearer. The Tenth Circuit stated that, "[h]aving thoroughly considered its merits, we decline to adopt the 'wholly groundless' approach." *Belnap* v. *Iasis Healthcare*, 844 F.3d 1272, 1286 (10th Cir. 2017). And the Eleventh Circuit was equally direct, "join[ing] the Tenth Circuit in declining to adopt what has come to be known as the wholly groundless exception." *Jones* v. *Waffle House, Inc.*, 866 F.3d 1257, 1269 (11th Cir. 2017). Those decisions squarely conflict with decisions from the Fourth, Fifth, Sixth, and Federal Circuits adopting the exception. See, *e.g.*, *Simply Wireless, Inc.* v. *T-Mobile US, Inc.*, 877 F.3d 522, 528 n.5

(4th Cir. 2017) (recognizing the conflict), petition for cert. pending, No. 17-1423 (filed Apr. 9, 2018).[1]

b. In the face of that expressly recognized conflict, respondent doggedly maintains that the conflict is "illusory" because (at least in respondent's opinion) the Tenth and Eleventh Circuits did not "truly" confront arbitrability claims that were "unquestionably 'groundless.'" Br. in Opp. 3, 16. In so contending, however, respondent badly misjudges the breadth of the holdings in *Belnap* and *Jones*. In both cases, the courts of appeals explicitly and categorically rejected *any* application of the "wholly groundless" exception. The outcome of those cases did not hinge on their particular facts; instead, the courts correctly concluded that, upon finding a delegation of arbitrability to the arbitrator, a district court's job was complete, regardless of the court's views on the merits of the arbitrability issue. See *Jones*, 866 F.3d at 1271; *Belnap*, 844 F.3d at 1287.[2] Whether the particular disputes were within the scope of the arbitration provisions at issue thus

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[1] Although the Fifth Circuit did not cite the Tenth and Eleventh Circuits' decisions in its opinion, it was plainly aware of them. See C.A. Oral Arg. at 9:15 (June 7, 2017) <tinyurl.com/ca5argument> (Higginson, J.) ("Then you get to the legal arguments, and you may be right, *Douglas* may just be wrong. There is a pretty healthy split."); *id.* at 34:43 (Higginson, J.) ("*Qualcomm* started the wholly groundless exception. * * * Are you aware of any cert activity? Because there is a split, a clear split, and now we have been living with it for a while.").

[2] To the extent that the Eleventh Circuit went on to address in a footnote whether the defendant's claim of arbitrability was "wholly groundless," that discussion was dictum. See *Jones*, 866 F.3d at 1271 n.1 (stating that, "*even if* we were to apply the wholly groundless exception, we would still conclude that [the moving party's] arguments were not wholly groundless" (emphasis added)). The court's unequivocal rejection of the "wholly groundless" exception plainly constituted its holding.

had no bearing on the outcome in either case. Because there is a resulting conflict on the legal question of the validity of the "wholly groundless" exception, further review is warranted.

c. Respondent timidly contends that the circuit conflict is "not obviously entrenched," suggesting that the Tenth and Eleventh Circuit decisions rejecting the "wholly groundless" exception may not "reflect the final say of those courts." Br. in Opp. 16-17. Of course, it is fairly rare, if not unheard of, for the Court to await further percolation in a case presenting a 4-2 circuit conflict.

In any event, the prospect of the Tenth and Eleventh Circuits *both* reversing themselves is remote, especially given the limitations on appellate review. In the wake of *Belnap* and *Jones*, district courts in those circuits must send disputes to arbitration upon finding a delegation of arbitrability to the arbitrator. Because there is no right to interlocutory review of such a decision, see 9 U.S.C. 16(b), it is unlikely that either court of appeals will even have the opportunity to revisit the validity of the "wholly groundless" exception, much less decide to do so en banc. There is thus no realistic possibility that the existing conflict will resolve itself without this Court's intervention; if anything, the conflict will only grow deeper, with even greater uncertainty for parties to arbitration agreements, as the remaining courts of appeals pick sides.

What is more, there would be no benefit to further percolation, because it would not assist the Court in deciding whether the "wholly groundless" exception is consistent with the FAA. The arguments for and against recognizing the "wholly groundless" exception have been "thoroughly considered" in opinions from six courts of appeals, *Belnap*, 844 F.3d at 1286, including a vigorous dissent from the Fifth Circuit's decision adopting respondent's

position, see *Douglas* v. *Regions Bank*, 757 F.3d 460, 464 (5th Cir. 2014) (opinion of Dennis, J.).

As matters currently stand, whether delegation provisions in arbitration agreements are always enforceable depends on the location of the parties. The resulting inconsistency for parties to arbitration agreements is intolerable, and the entrenched conflict on the validity of the "wholly groundless" exception cries out for the Court's immediate review.

2. Respondent seeks to minimize the significance of the "theoretical disagreement" among the courts of appeals by stressing the purported narrowness of the "wholly groundless" exception. See Br. in Opp. 3, 17-20. But the facts of this case belie any suggestion that the "wholly groundless" exception applies only where the argument for arbitrability is "frivolous or otherwise illegitimate." *Id.* at 17. The magistrate judge initially compelled arbitration on the ground that there was a "plausible construction [of the arbitration provision] calling for arbitration." Pet. App. 41a-42a. Yet the district court and court of appeals, applying the "wholly groundless" exception, reached a different conclusion. See *id.* at 15a-16a, 34a-37a.

This case therefore perfectly illustrates the practical consequences of the "wholly groundless" exception: it usurps parties' bargained-for rights to have arbitrability determined by an arbitrator. And while respondent is correct not to "presume any significant daylight between the views of arbitrators and the judiciary," Br. in Opp. 18-19, the conclusion it draws from that premise is exactly backward. The FAA assumes that arbitrators are "competent, conscientious, and impartial." *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 634 (1985). Where the parties have agreed that the arbitra-

tors will decide arbitrability, the "liberal federal policy favoring arbitration agreements," *Moses H. Cone*, 460 U.S. at 24, requires that the parties' intention be given effect. The judge-made "wholly groundless" exception overrides the parties' agreement and thereby flouts both the FAA and this Court's long line of decisions interpreting it.

As a result of the "wholly groundless" exception, moreover, parties across the country are being forced to spend significant time and money litigating in federal court, rather than enjoying the efficient, economical dispute-resolution procedure for which they bargained. Preventing that needless waste of resources is yet another reason for the Court to grant review, as this case starkly demonstrates. If the magistrate judge's order had only been followed, the arbitrator could have resolved arbitrability and then the merits of the dispute long ago. Instead, this case has wended its way through multiple layers of the federal court system, with arbitrability still left unresolved nearly six years later. Far from promoting efficiency, therefore, the "wholly groundless" exception undermines it.

3. Respondent briefly contends that this case is a poor vehicle for resolving the circuit conflict over the "wholly groundless" exception. See Br. in Opp. 20-24. That contention—which respondent also made in opposing petitioners' stay application, see Opp. to Appl. 14-18—lacks merit.

a. To begin with, respondent is plainly wrong in asserting that addressing the question presented would require the Court first to decide whether the applicable agreements delegated questions of arbitrability to the arbitrator. See Br. in Opp. 21-22. As respondent acknowledges, the court of appeals declined to resolve that question in the decision below, relying instead on the "wholly groundless" exception. See Pet. App. 10a-11a. This Court

can do the same. Whether the "wholly groundless" exception is consistent with the FAA is a pure question of law, and there is no threshold obstacle to reviewing and resolving that question in this case.

In any event, respondent's argument that no valid delegation exists wholly lacks merit. The arbitration clauses at issue expressly incorporate the rules of the American Arbitration Association (AAA), which unambiguously provide that "[t]he arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, *scope* or validity of the arbitration agreement." C.A. App. 118 (emphasis added). As noted in the petition (at 5), every court of appeals to have considered the question has held that the incorporation of AAA rules evinces a sufficiently clear intent to delegate questions of arbitrability to an arbitrator. See *Belnap*, 844 F.3d at 1284-85 & n.7 (collecting cases).

b. In apparent recognition of that well-established rule, respondent argues that, to the extent the arbitration clauses at issue incorporate AAA rules, they do not apply here in light of the carve-out for "actions seeking injunctive relief." See Br. in Opp. 22-24. But that is the very arbitrability question that, in petitioners' view, the arbitrator should have been permitted to decide: namely, "whether [the parties'] agreement cover[ed] [the] particular controversy" at issue. *Rent-A-Center, West, Inc.* v. *Jackson*, 561 U.S. 63, 68-69 (2010).

In any event, the better view is that, where an arbitration provision contains a carve-out for injunctive relief, it merely permits a court to award injunctive relief either on a preliminary basis to preserve the status quo *pending* arbitration, or on a permanent basis *after* the plaintiff secures an arbitration award in its favor. See, *e.g.*, *Lawrence* v. *Comprehensive Business Services*, 833 F.2d 1159,

1163 (5th Cir. 1987); *Sauer-Getriebe KG* v. *White Hydraulics, Inc.*, 715 F.2d 348, 350 (7th Cir. 1983), cert denied, 464 U.S. 1070 (1984); *Erving* v. *Virginia Squires Basketball Club*, 468 F.2d 1064, 1067 (2d Cir. 1972). Such a carve-out does not obliterate a party's right to arbitrate whenever a claimant engrafts a request for injunctive relief onto its underlying claim for damages. Especially given the magistrate judge's analysis, see Pet. App. 40a-41a, this is certainly not a case in which the question presented is "wholly academic" because an arbitrator would necessarily conclude that the dispute was not arbitrable. Br. in Opp. 24.

In short, as the Court presumably considered in deciding to grant petitioners' application for a stay, this case is a suitable vehicle in which to decide whether the "wholly groundless" exception is consistent with the FAA—a pure question of law that formed the sole basis of the decision below. Further review is warranted.[3]

4. Respondent devotes the remainder of its brief in opposition to defending the court of appeals' decision on the merits. See Br. in Opp. 24-27. As we have already

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[3] We are aware of two other currently pending petitions for certiorari that present questions concerning the "wholly groundless" exception, both filed by parties *opposing* arbitration. See *IQ Products Co.* v. *WD-40 Co.*, petition for cert. pending, No. 17-986 (filed Jan. 10, 2018); *Simply Wireless*, *supra*, No. 17-1423 (filed Apr. 9, 2018). In each of those cases, however, the court of appeals accepted the existence of the "wholly groundless" exception but concluded that the moving party's claim for arbitration was *not* "wholly groundless" (and thus remitted the dispute to arbitration). See Pet. at i, *IQ Products*, *supra*; Pet. at i, *Simply Wireless*, *supra*. As a result, the question on which the courts of appeals are divided—whether the "wholly groundless" exception is consistent with the FAA—would not be dispositive in either case, since the petitioners lost even under the more favorable legal rule. The Court should therefore either deny those petitions or, at most, hold them pending its decision in this case.

explained, the "wholly groundless" exception has no basis in the text of the FAA. See Pet. 15-20. We make just two additional points here and leave fuller responses to subsequent merits briefing if certiorari is granted.

a. Respondent claims to locate an "obvious" textual basis for the "wholly groundless" exception in Section 4 of the FAA. See Br. in Opp. 24-25. That provision authorizes courts to grant an order compelling arbitration to an "aggrieved" party "upon being satisfied" that the non-moving party has "fail[ed] to comply" with the agreement requiring arbitration. 9 U.S.C. 4. Tellingly, respondent did not make that supposedly "obvious" textual argument below. Nor did respondent advance that argument when it addressed the merits in opposing petitioners' stay application. See Opp. to Appl. 18-23.

In any event, respondent's textual argument lacks merit. Section 4 merely describes the minimal showing that a party seeking to compel arbitration must make in order to establish standing and entitlement to relief under the FAA—*i.e.*, that there is an agreement to arbitrate, that the moving party wishes to arbitrate, and that the non-moving party has refused to do so. Nowhere does Section 4 mandate a further inquiry into whether the movant's claim for arbitration is "baseless or illegitimate." Br. in Opp. 25. Respondent's interpretation of Section 4 would upend the principle that parties may "agree to arbitrate 'gateway' questions of 'arbitrability,'" *Rent-A-Center*, 561 U.S. at 68-69, and disrupt the settled expectations of countless parties such as petitioners that seek to enforce bargained-for delegation provisions.

b. Respondent further argues that the "wholly groundless" exception is necessary to effectuate the parties' intent to arbitrate only "legitimate" questions concerning arbitrability. Br. in Opp. 25 (emphasis omitted).

In making that argument, however, respondent unwittingly underscores the danger the "wholly groundless" exception poses to the enforceability of commercial arbitration agreements. By design, the "wholly groundless" test requires courts to consider arbitrability in the first instance even in those cases—such as this one—in which there *is* a legitimate argument concerning arbitrability. See Pet. App. 41a (magistrate judge's conclusion that there is a "plausible construction [of the arbitration provision] calling for arbitration"). It thereby expands a district court's role beyond that sanctioned by the FAA. If parties agree that an arbitrator will decide arbitrability, the FAA mandates that courts "*shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." *Dean Witter Reynolds, Inc.* v. *Byrd*, 470 U.S. 213, 218 (1985).

By permitting courts to disregard provisions delegating questions of arbitrability to an arbitrator, the "wholly groundless" exception betrays the "emphatic federal policy in favor of arbitral dispute resolution." *Mitsubishi Motors Corp.*, 473 U.S. at 631. And if the decision below is allowed to stand, the number of cases in which parties lose their bargained-for right to arbitration will only continue to grow. The Court should intervene to correct that decision and resolve a circuit conflict that is affecting arbitration agreements across the country.

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The petition for a writ of certiorari should be granted.

Respectfully submitted.

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